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No. 89-1111

In the Supreme Court of the United States

OCTOBER TERM, 1989

CARLOS ALBERTO BALLBE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, who had not acquired "lawful unrelinquished domicile of seven consecutive years" when the Immigration and Naturalization Service issued a show cause order to begin proceedings to deport him for narcotics trafficking, is eligible for discretionary relief from deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 886 F.2d 306. The decision of the Board of Immigration Appeals (Pet. App. 15a-22a), and the decisions of the administrative immigration judge (Pet. App. 23a-31a) are [redacted] unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1989 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on January 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case raises the question of petitioner's eligibility for discretionary relief from deportation under Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c). Because examination of this petition for certiorari requires consideration of issues concerning the applicability *vel non* of Section 212(c) in deportation proceedings—issues substantially broader than the particular issue concerning computation of time decided by the court of appeals—a brief overview of the application of Section 212(c) in deportation proceedings is necessary as background to the facts of this case.

1. Section 212 of the INA, 8 U.S.C. 1182, sets forth the categories of aliens who are "ineligible to receive visas and shall be excluded from admission into the United States," 8 U.S.C. 1182(a), as well as the circumstances under which an alien may be admitted despite the fact that he comes within one or more of those categories. Section 212(a), 8 U.S.C. 1182(a), lists in 33 paragraphs the principal categories of excludable aliens. Section 212(c), the provision at issue in this case, provides that aliens who fall within any but a few of those excludable categories[1] may nonetheless be eligible for discretionary admittance into the country:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion

[1] The categories of excludable aliens who are *per se* ineligible for Section 212(c) discretionary admission include undocumented nonimmigrants, 8 U.S.C. 1182(a)(26), Communists, Nazis, and other followers of totalitarian ideologies, 8 U.S.C. 1182(a)(27)-(29) and (33), and certain medical professionals, 8 U.S.C. 1182(a)(32).

> of the Attorney General without regard to the provisions of paragraphs (1) to (25) and paragraphs (30) and (31) of subsection (a) * * *.

The express language of the statute provides that an alien is eligible for discretionary waiver of exclusion under Section 212(c) only if he has been "lawfully admitted for permanent residence," has "temporarily proceeded abroad voluntarily and not under an order of deportation," and is "returning to a lawful unrelinquished domicile of seven consecutive years."[2] Other provisions of Section 212 contain additional exceptions from the excludable categories listed in Section 212(a).

2. In general, the grounds for deportation are set out in Section 241 of the INA, 8 U.S.C. 1251, and the circumstances under which deportation will be suspended despite the existence of those grounds in a particular case are set out, *inter alia*, in Section 244, 8 U.S.C. 1254.[3] Because the

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[2] See generally S. Rep. No. 355, 63d Cong., 2d Sess. 6 (1914) (discussing purposes of predecessor statute "to permit the readmission to the United States of aliens who have lived here for a long time and whose exclusion after a temporary absence would result in peculiar or unusual hardship"); S. Rep. No. 1515, 81st Cong., 2d Sess. 382 (1950) (discussing changes made when language of what is now Section 212(c) was incorporated in predecessor bill).

[3] Among the broadest such provisions is Section 244(a), which provides that deportable individuals may be eligible for discretionary adjustment of status and suspension of deportation if they meet certain requirements. The primary differences between the requirements of Section 244(a) and Section 212(c) are that (1) Section 244(a) requires that the alien have been "physically present in the United States for a continuous period of not less than" seven or ten years (depending upon the provision under which the alien is subject to deportation) while Section 212(c) requires a "lawful unrelinquished domicile of seven consecutive years," and (2) Section 244(a) requires that the alien show good moral character and hardship resulting from deportation, requirements that have no express counterparts in Section 212(c).

conditions of eligibility for suspension of deportation are in general more stringent than those for waiver of exclusion under Section 212(c), an individual presenting himself for admission to the country may be eligible for discretionary waiver of grounds of exclusion under Section 212(c) even if that same individual inside the United States would not be eligible, under statutory provisions other than Section 212(c), for discretionary suspension of deportation.

Although there is some correspondence between grounds for exclusion and grounds for deportation, the two are by no means identical. For example, an alien may be excluded because he is mentally retarded, insane, or has a mental defect. See 8 U.S.C. 1182(a)(1)-(3). The comparable ground for deporting an alien applies only to those aliens who had such a mental deficiency at the time of entry and also have been hospitalized for the deficiency within five years after entry. 8 U.S.C. 1251(a)(3). Other grounds for exclusion have no counterpart in the deportation provisions. See, *e.g.*, 8 U.S.C. 1182(a)(4) (sexual deviation); 8 U.S.C. 1182(a)(6) (contagious disease); 8 U.S.C. 1182(a)(11) (polygamists). Similarly, some grounds for deportation have no precise counterpart in the exclusion provisions. For example, illegal entry is itself a ground for deportation. See 8 U.S.C. 1251(a)(2). See also 8 U.S.C. 1251(a)(14) (conviction for possessing certain firearms). See generally Note, *Lawful Domicile Under Section 212(c) of the Immigration and Nationality Act*, 47 U. Chi. L. Rev. 771, 772-773 & nn. 9-11 (1980).

3. In a series of decisions under Section 212(c) and its predecessor (the Seventh Proviso to Section 3 of the Immigration Act of 1917, ch. 29, 39 Stat. 878[4]), the Attorney

[4] The Seventh Proviso specified that, notwithstanding the existence of grounds for exclusion, "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years

General, the Board of Immigration Appeals, the Immigration and Naturalization Service (INS), and the courts have gradually but dramatically expanded the scope of the statute. The first decision applying the Seventh Proviso in deportation proceedings was *Matter of L*, 11& N Dec. 1 (AG 1940). The alien in *Matter of L* had entered the country, committed and been convicted of an excludable offense (larceny), and then traveled abroad. When he returned, he had been readmitted with no mention of his conviction and no application for waiver of this ground of exclusion. The Attorney General ruled that, in these circumstances, the predecessor of Section 212(c) was available to waive the ground of exclusion *nunc pro tunc*, thus rendering the alien's re-entry legal. In addition, although the alien still could have been deported on the ground that he had been convicted of a crime involving moral turpitude prior to his most recent entry into the country and was apparently not eligible for discretionary relief under any other provision, the Attorney General ruled that the retroactive waiver of the ground of exclusion precluded deportation for the corresponding but otherwise nonwaivable ground for deportation.

After Section 212(c) replaced the Seventh Proviso, similar decisions were reached applying Section 212(c) in deportation proceedings in which, as in *Matter of L*, the permanent resident alien had entered the country legally, subsequently committed an excludable offense, and then become deportable because he made a trip abroad and was readmitted with no mention—and no waiver—of the excludable offense. *E.g.*, *Matter of S*, 6 I & N Dec. 392 (BIA 1954; AG 1955) (holding that Congress did not intend to prohibit this practice when it replaced the Seventh Proviso

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may be admitted in the discretion of the [Attorney General], and under such conditions as he may prescribe."

with Section 212(c)); *Matter of G—A—*, 7 I & N Dec. 274 (BIA 1956) (grant of Section 212(c) waiver precludes deportation on corresponding ground of deportation). *Matter of Edwards*, 10 I & N Dec. 506 (BIA 1963, 1964), went one step further. The alien once again had been admitted as a permanent resident and was then convicted of offenses that rendered him subject to both exclusion and deportation. He subsequently visited Canada for a few hours to attend a funeral. *Id.* at 506. Under *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), this brief visit abroad did not lead to "entry" back into the United States, and thus the alien could not have been excluded from the country when he presented himself at the border. Yet, notwithstanding the fact that the alien was never subject to exclusion after having committed the excludable offense, the Board of Immigration Appeals in a later deportation proceeding found him eligible for waiver of deportation under Section 212(c).

Despite this expansive interpretation of Section 212(c), until 1976 the statute was still read to require a departure from the United States, or a statutory "admissibility" condition to eligibility for adjustment of status,[5] in order to trigger the availability of relief in deportation proceedings. See, *e.g.*, *Matter of Arias-Uribe*, 13 I & N Dec. 696 (BIA 1971) (Section 212(c) relief unavailable to an alien who had not departed from the United States and was ineligible for adjustment of status), aff'd, *Arias-Uribe* v. *INS*, 466 F.2d 1198 (9th Cir. 1972). However, in *Francis* v. *INS*, 532

[5] In *Matter of Smith*, 11 I & N Dec. 325 (BIA 1965), the Board ruled that Section 212(c) relief was available in adjustment of status proceedings under Section 245 of the INA, 8 U.S.C. 1255, despite the fact that the alien had made no departure from and re-entry into the United States. The Board based its ruling on the fact that admissibility to the United States is one of the requirements for granting such an adjustment of status.

F.2d 268 (2d Cir. 1976), the Second Circuit held that an alien who had not left the country at all, and who was not seeking to prove his "admissibility" for purposes of a Section 245 adjustment of status proceeding, was eligible for Section 212(c) relief. The court based its holding on its view that the individual subject to deportation in that case was denied eligibility for Section 212(c) relief solely because he had failed to travel abroad, even for a few hours as in *Matter of Edwards*. According to the court, he was thereby "subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest." 532 F.2d at 273. The failure to include him within the class covered by Section 212(c), as it had been construed up to that time, was held to be unconstitutional.

The Board of Immigration Appeals subsequently applied the *Francis* rule nationwide, in part because the Solicitor General had determined not to file a petition for certiorari in *Francis* and the INS decided to apply the *Francis* rationale nationwide to permit aliens who had not traveled abroad to apply for Section 212(c) relief. See *Matter of Silva*, 16 I & N Dec. 26, 29-30 (BIA 1976); *id.* at 32-33 (concurring opinion).* As a result of this sequence

* Although the Ninth Circuit at first reaffirmed its previous decision rejecting the *Francis* theory, the Supreme Court remanded the case to the court of appeals for reconsideration in light of the Solicitor General's representation that the government no longer supported the Ninth Circuit rule. *Tapia-Acuna* v. *United States*, 449 U.S. 945 (1980). On remand, the Ninth Circuit followed *Francis*, holding that the distinction between aliens who had traveled abroad and those who had not was irrational, and that consequently "eligibility for § 1182(c) relief cannot constitutionally be denied to an otherwise eligible alien who is deportable under § 1251(a)(11), whether or not the alien has departed from and returned to the United States after the conviction giving rise to deportability." *Tapia-Acuna* v. *INS*, 640 F.2d 223, 225 (9th Cir. 1981).

of events, the *nunc pro tunc* fiction was abandoned; Section 212(c) became generally available to aliens, whether or not they had left the country after the basis for their deportation had arisen. Although such individuals may never have been subject to exclusion, they could still take advantage of Section 212(c) to obtain what now amounted to a discretionary waiver of deportation.

4. Petitioner is a native and citizen of Argentina, where he lived most of his life and where he became a lawyer and a judge. On May 12, 1977, at age 44, he immigrated to the United States and was admitted as a lawful permanent resident. Pet. App. 2a. He has a United States citizen spouse and four adult children who are either United States citizens or permanent resident aliens. *Ibid.* In September of 1983, he was convicted on his guilty plea of possession with intent to distribute cocaine in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a, 21a. He was sentenced to two years' imprisonment to be followed by a three-year special parole term. *Id.* at 2a.

5. On November 2, 1983, approximately six and one-half years after petitioner's admission to permanent residence, the INS issued an order to show cause alleging that petitioner was deportable under section 241(a)(11) of the INA, 8 U.S.C. 1251(a)(11), by virtue of his cocaine trafficking conviction.[7] Pet. App. 2a. Petitioner was

[7] At the time of petitioner's deportation hearing, Section 241(a)(11), 8 U.S.C. 1251(a)(11) (1982), provided in part for the deportation of any alien "who at any time has been convicted of a violation of * * * any law or regulation relating to the illicit possession of or traffic in narcotic drugs * * * or * * * governing or controlling the * * * transportation, sale, exchange, * * * importation, exportation, or the possession for [such] purpose[s] * * * of * * * coca leaves, * * * [or] any salt derivative or preparation of * * * coca leaves."

This statute was amended, without material change for purposes of this case, by Section 1751(b) of the Anti-Drug Abuse Act of 1986,

served with the show cause order by mail at his place of criminal incarceration (*ibid.*), but asserted that he may not have actually become aware of the show cause order until May 1984. *Id.* at 3a.

Petitioner's deportation hearing commenced in May 1985, after his release from criminal confinement. He denied deportability, but alternatively sought relief from deportation under Section 212(c) and offered extensive evidence in support of that request for relief.

In an order dated August 28, 1986, the immigration judge found petitioner deportable and denied his application for Section 212(c) relief. Pet. App. 25a-31a. The immigration judge concluded that petitioner was not eligible for a Section 212(c) waiver by virtue of the ruling in *Marti-Xiques* v. *INS*, 741 F.2d 350 (11th Cir. 1984). In *Marti-Xiques*, the Eleventh Circuit—the circuit in which the deportation proceeding arose—had ruled that the statutory "seven year lawful unrelinquished domicile" requirement for Section 212(c) relief was measured as of the date of the issuance by the INS of the show cause order. Petitioner had been a domiciliary of the United States for only six and one-half years at the time the show cause order was issued by INS, and thus could not meet the seven year requirement. Pet. App. 26a-27a.

7. Petitioner's administrative appeal was dismissed by the Board of Immigration Appeals on August 3, 1988. Pet. App. 15a-22a. Considering itself bound by Eleventh Circuit precedent, the Board declined petitioner's invitation to follow its own rule, laid down in *Matter of Lok*,

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Pub. L. No. 99-570, 100 Stat. 3207-47, to provide for the deportation of any alien who "at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802))."

18 I & N Dec. 101 (BIA 1981), to the effect that lawful domicile for Section 212(c) purposes continues until the date of a final administrative finding of deportability. The Board upheld the immigration judge's ruling that petitioner was not eligible for relief, rejecting in the process the additional arguments that the November 1983 show cause order was not properly served, and that the June 1985 date of an amended show cause order ought to control instead. Pet. App. 17a-19a.

Unlike the immigration judge, the Board also turned to the merits of the petitioner's Section 212(c) application and declared that it would in any event deny discretionary relief to petitioner. Pet. App. 19a. In accordance with its established approach to Section 212(c) claims (see *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978); *Matter of Buscemi*, Interim Dec. No. 3058 (BIA 1988)), the Board weighed petitioner's favorable "equities" against his criminal activity. It concluded that petitioner had outstanding favorable equities by virtue of his close family ties to his citizen wife and children, his history of gainful employment, his educational background, and his residence in the United States since 1977. Pet. App. 21a. Weighing against petitioner were the facts that he came to the United States as an adult at age 44 (instead of at a young age), that he had been educated and had established a career in Argentina, that he should have known the seriousness of his offense because of his background as a lawyer and judge, and, most importantly, that he had committed a very serious crime, having been the courier of a significant quantity of illegal drugs. *Ibid.* The Board concluded:

> Balancing the outstanding equities which the [petitioner] had been able to establish in this case, we do not find that granting relief is warranted or is in the best interest of this country. While the [petitioner's]

> deportation may well involve hardship to himself and unhappiness for his family, the responsibility for this result rests with the [petitioner] alone.

Pet. App. 22a.

8. Pursuant to Section 106 of the INA, 8 U.S.C. 1105a, petitioner sought review of the Board's order by the court of appeals. The court of appeals refused to reconsider its *Marti-Xiques* decision and rejected petitioner's arguments respecting the alleged improper service of the 1983 show cause order, the 1985 amendment of the show cause order, and the retroactivity of its *Marti-Xiques* decision. Pet. App. 1a-10a. Relying on *Marti-Xiques*, the court found that petitioner was barred from Section 212(c) relief because he "failed to show that he had maintained lawful unrelinquished domicile in the United States for seven years prior to issuance of the order to show cause." Pet. App. 10a.

ARGUMENT

Petitioner correctly notes that there is a conflict among the circuits respecting the accrual of lawful domicile for Section 212(c) purposes, and that the ruling of the court of appeals in this case is not consistent with the current position of the Board of Immigration Appeals. Moreover, the rule for calculating the period of lawful unrelinquished domicile is a question of importance to permanent resident aliens facing deportation and to the government in the administration of the immigration laws.

Nevertheless, the petition for certiorari should be denied. The conflict in the courts of appeals stems from difficulty in applying Section 212(c)'s language (concerning an alien "returning to a lawful unrelinquished domicile of seven consecutive years") to aliens who are not "returning" to the country at all, but rather are present within the

United States and facing deportation. Although in an ordinary exclusion case the statutory language can be given meaning by calculating the seven year period as of the date the alien "returns" to the country, the statute provides for no comparably straightforward calculation in the deportation context. The difficulties with which the courts of appeals have been struggling are thus a product of the effort to apply a statute originally intended to govern exclusion to individuals who are not, and never have been, subject to exclusion. Any effort by this Court to construe the language of Section 212(c) would likely require consideration of not only the narrow issue of computation of time raised by petitioner, but also the much broader questions whether and under what circumstances Section 212(c) is applicable to petitioner's deportation proceeding at all.

In our view, this is not an opportune time to embark on such a fundamental re-examination of Section 212(c). The question whether Section 212(c) applies in deportation proceedings was not litigated in this case, nor has it recently been litigated before any administrative forum or any court of appeals. This Court would thus not have the benefit of consideration of this underlying issue by administrative authorities and lower courts if review were granted in this case. In addition, at the request of the INS, the Attorney General has recently undertaken a full-scale review of the application *vel non* of Section 212(c) in deportation proceedings. If the Attorney General decides that Section 212(c) has little or no application in deportation proceedings, and if that determination is subsequently upheld by the courts, the present conflict in the circuits as to the computation of time under Section 212(c) in deportation proceedings would lose any continuing significance. Even if the Attorney General does not take this step, the process of review that is now underway with respect to the underlying issue may be of substantial assistance to the

Court when the computation of time issue arises again in another case. Because orderly resolution of the larger issues raised by this case would benefit from permitting the Executive Branch in the first instance to complete its own re-evaluation of the statute, further review of this case is not warranted at this time.

In any event, there is an alternative basis for the result reached by the court of appeals in this case. The Board of Immigration Appeals determined that, even if petitioner were eligible for Section 212(c) relief, he would not merit a favorable exercise of the Attorney General's discretion. Although the court of appeals did not reach this issue, the Board's determination provides a sound independent basis for the result below.

Finally, we submit that if Section 212(c) relief is available to an alien subject to deportation, then the decision of the Eleventh Circuit in this case is correct.

1. Petitioner understandably does not question the extension of Section 212(c) relief to deportation proceedings, but rather attacks the way in which the court of appeals calculated the length of his "lawful unrelinquished domicile." As petitioner notes (Pet. 6), differing positions have been taken by the Board and a number of courts of appeals on this question.

The Board's rule, laid down in *Matter of Lok*, 18 I & N Dec. 101 (BIA 1981), is that the domicile of a permanent resident remains lawful and continues to accrue for Section 212(c) purposes only so long as the alien retains his lawful permanent resident status, and that permanent resident status terminates upon a final administrative finding of deportability. See 8 U.S.C. 1101(a)(20). The Seventh Circuit has upheld this interpretation. See *Variamparambil* v. *INS*, 831 F.2d 1362 (1987).[8] Other circuits have held

[8] Although petitioner asserts (Pet. 11-13) that the Fifth Circuit has also adopted this position, the position of the Fifth Circuit is not en-

or suggested that the cutoff point might occur earlier or later than the point adopted in *Matter of Lok*, depending upon whether the alien challenges the finding of deportability or merely seeks discretionary relief. See *Avila-Murrieta* v. *INS*, 762 F.2d 733, 735 (9th Cir. 1985); *Wall* v. *INS*, 722 F.2d 1442 (9th Cir. 1984); *Lok* v. *INS*, 681 F.2d 107, 110 (2d Cir. 1982).[9]

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tirely clear. Section 212(c) refers to two requirements that are at least conceptually distinct. First, the alien applying for Section 212(c) relief must be "lawfully admitted for permanent residence." See 8 U.S.C. 1101(a)(20) (definition of terms). Second, the alien must have a "lawful unrelinquished domicile of seven consecutive years." *Variam-parambil* v. *INS*, 831 F.2d 1362, 1365-1366 (7th Cir. 1987). In two decisions, the Fifth Circuit ruled that an alien's "permanent residence" ended at the time the order of deportation becomes administratively final, and that the alien was therefore ineligible to seek Section 212(c) relief from deportation after that time. *Garcia-Hernandez* v. *INS*, 821 F.2d 222 (5th Cir. 1987); *Rivera* v. *INS*, 810 F.2d 540 (5th Cir. 1987). Yet neither of these decisions expressly addressed the question of how to compute seven years of "lawful unrelinquished domicile" or whether the termination of status as "lawfully admitted for permanent residence" occurs at the same time as the termination of "lawful unrelinquished domicile." Therefore, although it may be that the two requirements are related in that "it is illogical to conclude that the domicile of one who retains his lawful permanent resident status could be anything but lawful," *Matter of Lok*, 18 I & Dec. 101, 105 (BIA 1981), it cannot be said that the Fifth Circuit has taken a position as to the proper calculation of "lawful unrelinquished domicile," the precise issue before the Court on this petition.

[9] In *Dabone* v. *Karn*, 763 F.2d 593, 598 (1985), the Third Circuit held that it did not have to choose between the rule that the seven-year period ends when the deportation order becomes administratively final and the Eleventh Circuit rule that the period terminates upon issuance by the INS of a show cause order. By either calculation, the alien in that case would not have been able to show that seven consecutive years of unrelinquished lawful domicile had elapsed. Because the procedurally complex *Dabone* case was an exclusion case, it is not clear in any event that its calculation of time under Section 212(c)

Rejecting the Board's approach, the Eleventh Circuit has adopted a position regarding the accrual of lawful domicile that is not tied to the continuation of the alien's lawful permanent resident status. Instead, it declared in *Marti-Xiques* v. *INS*, 741 F.2d 350 (11th Cir. 1984), that lawful domicile would cease accruing upon the issuance by the INS of an order that the alien show cause why he should not be deported. In the wake of *Marti-Xiques*, the INS has sought to have the Board reconsider its decision in *Matter of Lok* and has argued that the Board should adopt the *Marti-Xiques* rule. The Board, however, has not formally reconsidered *Matter of Lok*.[10]

2. It is a commonplace that statutory interpretation must begin with the terms of the statute itself. *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1, 5 (1985). The language of Section 212(c) makes discretionary relief from specified grounds of exclusion available to aliens "who temporarily proceeded abroad" and "who are returning to a lawful unrelinquished domicile of seven consecutive years." These terms are in general easily applied in the exclusion setting, at least absent parole into the country or a similar complicating factor. Rather than turning on when the "lawfulness" of a continuing domicile terminates for purposes of Section 212(c), the computation of time can simply be calculated as of the date on which the alien "returns" from a voluntary trip abroad.[11]

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would have been at odds with any of the cited deportation cases. See also *Reid* v. *INS*, 756 F.2d 7 (3d Cir. 1985) (seven-year period ends at some time before actual deportation from country).

[10] In an unpublished decision, the Board has declined to follow the INS's suggestion that the *Marti-Xiques* rule should be adopted. See *Matter of Totolos*, No. A-3497579 (BIA July 31, 1985).

[11] In decisions predating the *Francis* case, which made Section 212(c) generally applicable in deportation proceedings with no need to show that the alien had made an entry or had other occasion to make

The courts that have reached conflicting decisions as to the computation of time in applying Section 212(c) to waiver of deportation have, of necessity, ignored the statutory terms that limit Section 212(c) to waiver of specified grounds of exclusion, require that the alien have "temporarily proceeded abroad," and require that he be "returning" to the United States. Thus, focussing almost exclusively on the term "lawful," each of those courts has reached its conclusion based on its determination of when in a deportation proceeding the alien's domicile in the United States ceases to be "lawful." See, *e.g.*, *Variamparambil* v. *INS*, 831 F.2d at 1366; *Avila-Murrieta* v. *INS*, 762 F.2d at 734; *Lok* v. *INS*, 681 F.2d at 107; *Marti-Xiques* v. *INS*, 741 F.2d at 352. Similarly, the Board of Immigration Appeals has adopted its rule on the basis of a determination that an alien's status as "lawfully admitted for permanent residence" terminates when an order of deportation becomes administratively final, and that termination of this status in turn terminates the period of

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an admissibility showing, the courts of appeals had indicated in both deportation and exclusion cases that the computation of time would be calculated as of the date of entry. See *Ungo* v. *Beechie*, 311 F.2d 905, 907 (9th Cir.) ("the period dates back from the entry at which the Secretary is to use his discretion"), cert. denied, 373 U.S. 911 (1963); *Transatlantica Italiana* v. *Elting*, 74 F.2d 732, 733 (2d Cir. 1935) (interpreting Seventh Proviso); *Navigazone Generale Italiana* v. *Elting*, 66 F.2d 537, 540 (2d Cir.) (interpreting Seventh Proviso to require that "domicile must go back seven years from the date of the last arrival"), cert. denied, 290 U.S. 691 (1933). More recently, however, the Board of Immigration Appeals has shown signs of applying its expansive Section 212(c) deportation rulings in the exclusion setting. See, *e.g.*, *Matter of Duarte*, 18 I & N Dec. 329 (BIA 1982) (relying on *Matter of Lok*, *supra*, and *Francis* v. *INS*, *supra*, for the conclusion that an alien does not lose his status as a "lawful permanent resident" until the entry of a final administrative finding of exclusion).

"lawful unrelinquished domicile." *Matter of Lok*, 18 I & N Dec. 101 (BIA 1981).[12]

Although the applicability of Section 212(c) in deportation proceedings has not been recently litigated in any of the decided cases, it may prove difficult to achieve a satisfactory resolution of the conflict in the circuits concerning the computation of time in a Section 212(c) deportation case without reaching this underlying issue. First, the Court may find that the statute cannot sensibly be interpreted without taking full account of *all* of its terms. Yet any interpretation of the statute's reference to grounds of exclusion and its employment of the terms "temporarily proceeded abroad" and "returning to a lawful unrelinquished domicile" necessarily raises the question whether the statute applies to deportation proceedings at all. Second, as noted above, the split in the circuits focuses on when in the course of a deportation proceeding an alien's domicile ceases to be lawful. Although this question should be resolved if Section 212(c) has any application to deportation proceedings, the conflict simply disappears if Section 212(c), properly understood, has no such application.

3. The possible need to consider the applicability *vel non* of Section 212(c) in deportation proceedings in order to resolve this case would not by itself suggest that review of this case is unwarranted. However, the Attorney General has recently undertaken his own thorough examination of this precise question in the context of another case (Matter of Hernandez, No. A17 963 863

[12] The failure of the courts of appeals to give effect to each of the terms of the statute may be understandable. As outlined above, Section 212(c) has undergone a long-and unique history of administrative and judicial construction that has entrenched its application in the deportation setting. Moreover, the litigants themselves have not sought in these cases to raise the underlying issue of whether Section 212(c) is applicable at all in deportation proceedings.

(BIA, Jan. 11, 1990)), discussed below. Because the Attorney General's examination is designed to clarify the Executive Branch's position as to the meaning of Section 212(c) and may precipitate litigation of broader questions concerning the applicability of Section 212(c) in the courts of appeals, we submit that consideration of the issues involved in this case may fruitfully be postponed until the Attorney General, assisted by the Office of Legal Counsel of the Department of Justice, has completed his review.[13]

The conflict concerning the computation of seven years' unrelinquished lawful domicile is not the only difficulty raised by the application of Section 212(c) in the deportation context. Section 212(c) in terms permits admission of an alien notwithstanding the fact that the alien falls within certain excludable categories. See pp. 4-8, *infra*. Prior to this year, the Board of Immigration Appeals had determined that a discretionary waiver under Section 212(c) would therefore be available only to aliens who had been found deportable under a ground of deportation for which there is a comparable ground of exclusion. See, *e.g.*, *Cabasug* v. *INS*, 847 F.2d 1321 (9th Cir. 1988); *Matter of Granados*, 16 I & N Dec. 726 (BIA 1979); *Matter of Salmon*, 16 I & N Dec. 734 (BIA 1978).[14] In *Matter of Hernandez*, *supra*, a majority of the Board recently reversed this position. The Board held that Section 212(c)

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[13] Both the Board of Immigration Appeals and the INS, as part of the Department of Justice, are subject to the direction of the Attorney General. 8 U.S.C. 1551 (INS); 8 C.F.R. 3.1 *et seq.* (Board of Immigration Appeals).

[14] But cf. *Marti-Xiques* v. *INS*, 713 F.2d 1511 (11th Cir. 1983) (alien deportable under two separate grounds, only one of which corresponds to a ground for exclusion, is eligible for Section 212(c) relief), vacated, 724 F.2d 1463, rev'd on other grounds, 741 F.2d 350 (11th Cir. 1984).

would continue to be unavailable to waive any ground of deportation corresponding to those grounds of exclusion – generally involving politically undesirability – for which Section 212(c) is unavailable.[15] However, Section 212(c) henceforth would be available to an alien subject to deportation on *any* other ground, including those grounds that do not correspond to any ground of exclusion.[16] In reaching this result, the majority relied on the fact that "section 212(c) as currently applied bears little resemblance to the statute as written." Slip op. 4.

The Commissioner of INS requested that the *Hernandez* decision be certified to the Attorney General for further review. See 8 C.F.R. 3.1(h)(1). The Commissioner requested that the Attorney General undertake a comprehensive reexamination of Section 212(c) as a form of relief in deportation proceedings, and that the Attorney General overrule the many past administrative interpretations that have strayed from the language of the statute. On April 6, 1990, the Board referred the case to the Attorney General, accompanying the referral with a memorandum noting that publication of *Hernandez* was being withheld.[17] As a result of this referral, a thorough study, including briefing of the issues by the *Hernandez* parties, will be undertaken.

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[15] Because the Ninth Circuit in 1988 had rejected the approach adopted by the Board in *Hernandez*, see *Cabasug* v. *INS*, 847 F.2d 1321 (9th Cir. 1988), it appears that the Board will not apply the new approach in cases arising in the Ninth Circuit. See *Hernandez*, slip op. 6.

[16] In *Hernandez*, the alien was deportable for having entered the country without inspection, a ground for deportation that has no corresponding ground of exclusion. See Section 241(a)(2) of the INA, 8 U.S.C. 1251(a)(2).

[17] We have lodged with the Court and served on petitioner copies of the *Hernandez* decision, the INS request for referral, and the Board's memoranda that accompanied the referral.

The particular issue raised by the *Hernandez* case is different from the particular issue here; there is no dispute that petitioner's potential ground of deportation (8 U.S.C. 1251(a)(11)) does correspond to a ground of exclusion (8 U.S.C. 1182(a)(23)). Yet the issue that the Attorney General has been asked to re-examine is precisely the broader issue underlying this case: whether Section 212(c) has any application in deportation proceedings.

If the Attorney General agrees with the INS that the statute has little or no application in deportation proceedings, his ruling would no doubt be subjected to searching review in future cases in the courts of appeals. This would have several benefits. Perhaps the lower courts would be able satisfactorily to resolve the extent to which Section 212(c) applies in deportation proceedings, rendering it unnecessary for this Court to resolve the question. And if the issue is brought here for review, the Court would consider it with the benefit of recent and thorough administrative and judicial analysis directly on point. Finally, if it were ultimately determined that Section 212(c) is limited to the exclusion setting, the narrow question presented by this case concerning computation of time in cases in which Section 212(c) is applied in the deportation setting would lose any continuing importance.

If the Attorney General determines that an expansive construction of Section 212(c) is appropriate, the Court may still benefit from clarification when the computation of time question arises in other cases. In short, orderly resolution of the larger issues raised by this case would benefit from permitting the Executive Branch in the first instance to complete its own re-evaluation of the statute.

3. A further consideration supports denial of certiorari in this case. As petitioner correctly notes, the Board is not restricted by the immigration judge's action in a case, but rather has *de novo* review authority to make its

own factual determinations from the record (Pet. 11). See *Patel* v. *INS*, 811 F.2d 377, 381 n.8 (7th Cir. 1987); *Cardoza-Fonseca* v. *INS*, 767 F.2d 1448, 1455 (9th Cir. 1985), aff'd on other grounds, 480 U.S. 421 (1987). The immigration judge had permitted petitioner to present his full case for the Section 212(c) waiver, and the Board used its *de novo* review powers to go beyond the question of statutory eligibility and to deny relief in the exercise of discretion.

The Board fully considered the favorable and unfavorable aspects of petitioner's case (Pet. App. 19a-22a). It determined that the seriousness of petitioner's offense was not outweighed by his ties here, nor by his evidence of remorse and rehabilitation. The Board's discretionary denial of relief was well within its authority and was not inconsistent with its actions in similar cases. See *Blackwood* v. *INS*, 803 F.2d 1165 (11th Cir. 1986). Consequently, the result below was proper regardless of the correctness of the court of appeals' rationale. Postponing resolution of the circuit conflict concerning the computation of time is therefore unlikely to have any impact on petitioner's own case.

4. Finally, we submit that if Section 212(c) relief is available to an alien subject to deportation, then the conclusion of the Eleventh Circuit in *Marti-Xiques* and in this case is correct: the alien is eligible for such relief only if seven years of unrelinquished lawful domicile have passed prior to the issuance by the INS of the show cause order. Neither of the arguments advanced by petitioner against the Eleventh Circuit rule is persuasive.

First, petitioner argues (Pet. 8) that *Marti-Xiques* results in a permanent resident's loss of status without notice and a hearing. The decision in *Marti-Xiques* in fact does not extinguish permanent resident status at the time a a show cause order is issued. It simply reflects one reason-

able point in the deportation process at which the accrual of the seven years of domicile necessary for relief should stop.[18] All of the decisions addressing this issue implicitly recognized the need to draw some line; they merely differ on where that line is to be drawn.

Second, petitioner claims (Pet. 16) that using the date of issuance of the show cause order as the cut-off date "leaves the alien's eligibility date up to the vagaries of the administrative process." Petitioner's argument ignores the fact that *any* cutoff point is subject to attack on the ground that it may produce uneven results because of the procedural differences that arise in both the administrative and judicial review processes. The Board and at least the Seventh Circuit agree that an alien should not gain Section 212(c) eligibility by virtue of the delays possible during judicial review of a deportation order. *Matter of Lok, supra*; *Variamparambil* v. *INS*, 831 F.2d 1362 (7th Cir. 1987). The Eleventh Circuit rule merely employs the same reasoning to hold that an alien cannot achieve the necessary seven years' domicile by managing to protract the administrative process. *Marti-Xiques*, 741 F.2d at 355. In so holding, the court quite properly took into account the incentive and opportunities for delay that any contrary rule would create.

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[18] Cf. *Couch* v. *United States*, 409 U.S. 322, 329 n.9 (1973) ("rights and obligations of the parties became fixed when the [IRS] summons was served" and were not altered by subsequent transfer of possession of the records sought by the summons).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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